UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-8313-GW(Ex)	Date	June 5, 2017
Title	*Vardan Karapetyan v. ABM Indus. Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Michael B. Adreani	Bradley J. Hamburger Theane Evangelis

PROCEEDINGS: **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [68]**

The Court's Tentative Ruling is circulated and attached hereto. Court and counsel confer. For reasons stated on the record, Plaintiff's motion is continued to June 12, 2017 at 8:30 a.m. Amended moving papers will be filed by June 7, 2017.

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Initials of Preparer JG

Karapetyan v. ABM Indus. Inc., et al., Case No. CV-15-8313 GW (Ex)
Tentative Ruling on Amended Motion for Preliminary Approval of Settlement

Vardan Karapetyan ("Plaintiff") moves for certification of a class for settlement purposes only and preliminary approval of a class action settlement he has reached with defendants ABM Industries Incorporated, ABM Security Services, Inc., ABM Onsite Services – West, Inc., and ABM Onsite Services, Inc. (collectively "Defendants") in this action filed on October 23, 2015. The case involves alleged violations of California's Labor Code and Business and Professions Code involving the failure to pay wages (including overtime wages), the failure to provide meal and rest breaks, the failure to timely pay wages at termination, and the failure to provide accurate wage statements. *See* First Amended Class Action Complaint ("FAC"), Docket No. 27. Jurisdiction over this case is founded on diversity pursuant to the Class Action Fairness Act.

There has been no class certified in this case. On May 1, 2017, the Court denied an earlier version of this motion without prejudice because it concluded that, as of that time, Plaintiff had not demonstrated a basis to satisfy the "typicality" and "predominance" requirements for class certification set forth in Federal Rules of Civil Procedure 23(a)(3) and 23(b)(3), required even in the context of a settlement-only certification. Because of that threshold roadblock, the Court did not address the question of whether the settlement was sufficiently "fair, reasonable, and adequate" to warrant preliminary approval.

Plaintiff responded by filing an amended motion explaining, in more detail, the evidentiary basis for his belief that typicality and predominance are satisfied here. *See* Docket No. 68-1, at 13:15-16:13, 19:15-18, 20:1-21:11. In brief, Plaintiff explains that, as dictated by and consistent with the "nature of the work" conducted by class members, there was *no change* in Defendants' provision of meal or rest breaks throughout Plaintiff's time working for them, including *after* the time period covered by related state court litigation (that has itself now resulted in a pending class settlement), and that evidence suggests this was true across the locations Defendants serviced. This sufficiently demonstrates a basis to believe class members were subject to the same *unwritten* policies and practices (whether or not written policies are now in compliance with law), filling in the last hole in the necessary typicality demonstration, *see Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017), and this showing would

clearly be the central evidentiary concern in a class proceeding, sufficiently demonstrating predominance, *see Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 963-64 (9th Cir. 2013). As a result, Plaintiff has now resolved the Court's concerns expressed in its May 1, 2017, order.

Beyond the questions of typicality and predominance, the Court explained in its May 1, 2017, order why it felt that the remaining requirements for a settlement-only certification were satisfied:

> The Court has no qualms with respect to Plaintiff's showing as to numerosity (there are apparently over 7,000 class members, *see* Adreani Decl. (Docket No. 63-2) ¶ 14), *see* Fed. R. Civ. P. 23(a)(1), commonality (certainly there are at least *some* common questions of fact and law[1]), *see* Fed. R. Civ. P. 23(a)(2), adequacy (there is no apparent reason to question the effort and conflict-free status of Plaintiff or his counsel, *see* Adreani Decl. ¶¶ 18, 20-21), *see* Fed. R. Civ. P. 23(a)(4), and that class treatment would be "superior" to other methods of adjudicating the controversy because any class member wishing to prosecute his or her own action could opt out, there is no information suggesting that class members have already brought other individual actions in connection with the conduct alleged against Defendants for the time period in question (other than a small overlap with *Augustus v. ABM Security Services, Inc.*, No. S224853, see Adreani Decl. ¶¶ 2, 5, 17), and there is no information suggesting that it would be for some reason undesirable to concentrate this litigation in this forum, *see* Fed. R. Civ. P. 23(b)(3).

Docket No. 67, at pgs. 2-3 of 4. Those conclusions are as true and appropriate today as they were on May 1, 2017.[2] As such, the Court concludes that Plaintiff has sufficiently demonstrated a basis for a settlement-only certification.[3]

Once beyond the certification question, for the parties to gain *final* approval of their

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[1] For instance, the question of *whether* Defendants had a company-wide policy or practice that violated the various provisions of the Labor Code is a common question of both fact and law. *See also* Adreani Decl. ¶ 15.

[2] The citations in the block-quoted material above (and the accompanying footnote) are to Plaintiff's counsel's declaration filed in connection with Plaintiff's original motion for preliminary approval. All other citations to Plaintiff's counsel's declaration herein are to that declaration filed in connection with the *amended* motion now before the Court. *See* Adreani Decl. (Docket No. 68-2).

[3] As to the proposed class definition, however, the Court might question whether a class definition that refers to "non-exempt" security guards, *see* Adreani Decl. ¶ 16, will be a clear enough concept to potential class members that they will know whether or not they fit within the definition. It would also ask why only two of the four defendants are mentioned by name in the class definition. *See id.* At least the first of these concerns/questions might be alleviated by Plaintiff's assurance that the actual class members are "readily identified by [Defendants'] employment and payroll records," and by the fact that notice will actually be mailed to class members. Docket No. 68-1, at 11:2-4, 22:15-24. As an aside, on the issue of the sufficiency of that notice, in that it is designed to provide direct notice to class members the Court concludes that this form of notice is sufficient, the best notice practicable under the circumstances, and consistent with due process.

settlement, the Court would eventually have to determine that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). "[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017). At this, the preliminary approval stage, however, a court simply determines "whether a proposed settlement is 'within the range of possible approval' and whether or not notice should be sent to class members." *True v. Am. Honda Motor Co.*, 749 F.Supp.2d 1052, 1063 (C.D. Cal. 2010) (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981)); *see also Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 619 (N.D. Cal. 2014) ("At this juncture, '[p]reliminary approval of a settlement and notice to the class is appropriate if [1] the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, [4] and falls within the range of possible approval.'") (quoting *Cruz v. Sky Chefs, Inc.*, No. C-12-02705 DMR, 2014 WL 2089938, *7 (N.D. Cal. May 19, 2014)); *compare Staton v. Boeing Co.*, 327 F.3d 938, 952-53 (9th Cir. 2003) (discussing the detailed examination required at *final* approval). Ultimately, "[t]he judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions on it." Manual for Complex Litigation Fourth, § 21.61, at 309.

Here, Defendants have agreed to pay $5,000,000, to cover payments to class members (divided *pro rata* using the number of weeks worked by each class member, with work performed from October 6, 2010 through July 1, 2011 paid at 50% of the work-week value to account for overlap with rest break claims in the *Augustus* action), administrative costs,[4] a service award,[5] attorneys' fees and costs,[6] employee payroll taxes and a payment to the Labor and Workforce Development Agency ("LWDA") in connection with Plaintiff's Private

[4] Plaintiff asks that the Court appoint CPT Group, Inc., as the Claims Administrator, and estimates that its expenses will not exceed $80,000. *See* Docket No. 68-1, at 4:18-20, 25:3-7.

[5] The requested amount will not exceed $10,000. *See* Docket No. 68-1, at 4:27-28.

[6] Plaintiff's counsel anticipates seeking a fee award of one-third of the $5,000,000 settlement fund and costs in an amount not to exceed $25,000. *See* Docket No. 68-1, at 4:21-26.

Attorneys General Act claim,[7] with no amount reverting to Defendants (but instead being directed to three, yet-to-be-identified, "worthy *cy pres* organizations," Docket No. 68-1, at 5:27-28). Plaintiff states that all of the class members had their employment with Defendants terminated no later than December 10, 2015 (after a third party, Universal Protection Service, bought Defendants' security business, *see* Docket No. 63-1, at 3:7-12), so that there is no need for any sub-classing, and distribution of the remaining settlement funds will be based simply on each class member's length of employment with Defendants. *See* Adreani Decl. ¶ 21.

The settlement is the result of at least a moderate amount of discovery by counsel already familiar (from earlier litigation) with Defendants' practices[8] and of a full-day mediation with mediator Mark Rudy, including follow-on negotiations. *See id.* ¶¶ 6-8, 13. All counsel obviously recommend the settlement (or, at least, Defendants have not opposed the instant motion). *See id.* ¶¶ 14-15.

However, one gap in the presentation here might be that Plaintiff does not appear to provide the Court with any information of what amount he believes may have been recoverable if this case were litigated to completion. While the Court recognizes that settlement of complex actions such as the instant one are seen as favorable, generally, because of risks that otherwise might prevail and come to fruition, it may be difficult for the Court to determine whether the settlement figure is "within the range of possible approval" absent some information on the potential recovery.[9] Plaintiff also does not indicate what the average recovery might be as a

[7] Plaintiff proposes that $100,000 of the settlement fund be allocated for settlement of his Labor Code § 2698 claim, meaning that $75,000 would be paid to the LWDA in accordance with California Labor Code § 2699(i). *See* Docket No. 68-1, at 4:1-7.

[8] Plaintiff reports that Defendants initially produced in excess of 3,000 pages of documents, including employee handbooks, orientation and training materials, and Plaintiff's personnel file, time records, and payroll information. *See* Adreani Decl. ¶ 6. In addition, Defendants had begun production of documents from 40 sample sites, with the first four sites alone consisting of approximately 59 boxes of documents including security guard journals, time records, and notes. *See id.* Defendants took Plaintiff's deposition, and Plaintiff took the depositions of Plaintiff's supervisor and Defendants' Rule 30(b)(6) witness, covering 48 categories of topics. *See id.* ¶ 7. In addition, Plaintiff served numerous third party subpoenas. *See id.*

[9] Plaintiff cites *Officers for Justice v. Civil Service Commission of City and County of San Francisco*, 688 F.2d 615 (9th Cir. 1982), for the statement therein that "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the *negotiators*," *id.* at 625 (emphasis added), but a prohibited comparison to what a *negotiation* might otherwise have achieved is not the equivalent of precluding a comparison to what result the litigation, if successful, might have produced. Writing in the context of a bankruptcy case, the Supreme Court has opined that "[b]asic to [the process of deciding whether a proposed compromise is fair and equitable] in every instance…is the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25

result of the settlement.

Except as noted *supra* and *infra*, the Court would likely to conclude that the settlement is "within the range of possible approval" of being "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), considering the risks of continued litigation and the difficulties posed in any class action setting (*i.e.*, achieving certification, dealing with lengthy and expensive discovery, etc.). *See* Adreani Decl. ¶¶ 9-12. The time, effort and expense that likely would have gone into prevailing on the merits must be considered in assessing – at least preliminarily – a settlement that achieves relatively immediate relief for the classes. Moreover, any settlement involves a trade-off considering what is certain and uncertain, and the associated risk and reward.

Before granting preliminary approval, however, the Court would have the parties address, the following nits or comments concerning the papers filed along with the motion:

- Paragraphs 8 and 9 likely should be removed from the proposed order granting the preliminary approval. As those paragraphs read now, they "conditionally approv[e]" the requested $10,000 service award to Plaintiff, 33.3% of the settlement fund as attorney's fees, and up to $25,000 in costs. Docket No. 68-4 ¶¶ 8-9. A conditional approval serves no purpose, and whether to award those figures may potentially be informed by any objections that members of the class might submit. Perhaps the wording should be that the parties will request those amounts which the Court may or may not ultimately grant.
- The proposed schedule in paragraph 12 of the proposed order granting the preliminary approval does not provide for a date for claims to be made, *see* Docket No. 68-4, and the Settlement Notice indicates that, to get a share of the settlement, a class member need not do anything, *see* Settlement Agreement, Exh. B, at 3. However, section 2.10.2 of the settlement agreement provides that the Notice of Settlement will, among other things, "inform the Settlement Class Members of their right…to submit a claim." Settlement Agreement at 25:5-11. Will all class members who do not opt out receive payouts from this settlement regardless of whether they make a claim?

(1968). Thus, in determining whether the relief offered by way of a class action settlement is fair, the Ninth Circuit has compared settlements to "estimates of the maximum [recovery] in a successful litigation." *See Dunleavy v. Nadler (In re Mego Fin'l Corp. Secs. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000); *see also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

- Plaintiff does not appear to have addressed whether there is a separate side agreement between the parties and/or their counsel. *See* Fed. R. Civ. P. 23(e)(3); 28 U.S.C. § 1715(b)(5); *see also* O'Connell & Stevenson, California Practice Guide: Federal Civil Procedure Before Trial (2017), § 10:785, at 10-221. However, Section 2.33.1 of the settlement agreement would at least appear to suggest that there is no other side agreement. *See* Settlement Agreement at 33:10-13.
- The Court would note that Defendants have cancellation rights if the *Augustus* settlement is not finally approved or if more than five percent of the Settlement Class Members timely opt out of this settlement. *See* Settlement agreement at 9:14-10:3.
- While (as noted *supra*) the supporting brief only indicates that any funds left over will be distributed to "three worthy *cy pres* organizations," the settlement agreement actually identifies those organizations as the Legal Aid Foundation of Los Angeles, Legal Aid at Work, and the Women's Employment Rights Clinic. *See* Settlement Agreement at 17:1-8. The Court would keep in mind that "[a] cy pres award must be 'guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members, and must not benefit a group 'too remote from the plaintiff class.'" *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (quoting *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) and *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)); *id.* at 866 (indicating that a "noble goal,…[with] 'little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved'" is an insufficient demonstration of a proper *cy pres* recipient) (quoting *Nachsin*, 663 F.3d at 1039). The Court would ask for the parties' explanation as to how each of these three organizations would pass that test.
- With respect to the Notice of Settlement, the Court would ask the parties why the proposed form, in the caption, only makes reference to ABM Security Services, Inc. *See* Settlement Agreement, Exh. B, at 1.
- The parties might consider inserting into the Notice of Settlement language to the effect of capitalized terms used therein are defined in the settlement agreement, or

something similar. Otherwise, there are a number of capitalized terms in the Notice of Settlement, the particular meaning of which may not be clear to recipients.

- On page 7 of the Notice of Settlement, in the fifth line of the first full paragraph under Section E, "service awards to the named Plaintiffs" should be changed to "service award to the named Plaintiff."
- Finally, on that same page, in the third line of the last paragraph, "that claims administrator" should be changed to "the claims administrator."

Conclusion

Once the parties have adequately addressed the outstanding issues raised herein, the Court would issue an order preliminarily approving the class settlement and establishing the dates for further proceedings. If notice to the appropriate Federal and State officials, *see* 28 U.S.C. §1715(b), is provided the same day as the hearing in this matter,[10] the earliest the Court could hold a final approval hearing would be Thursday, September 7, 2017.

[10] The supporting materials indicate that the notice would be provided and that proof of service thereof would be provided. *See* Docket No. 68-1, at 23:22-24:3. As of this date, the parties have not yet provided such proof of service.